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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1196

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GRAMPLIN-SHEALY COMPANY, CHICAGO 365

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, the warden of the Illinois State Penitentiary, represents that the Circuit Court of Appeals for the Seventh Circuit, deciding the case of *United States ex rel. Rooney* v. *Petitioner* directing the district court to issue its writ of *habeas corpus,* has recognized that its decision is in conflict with this court's holding in *Woods* v. *Nierstheimer,* ... U. S. ..., 66 S. Ct. 996 (not yet officially reported). But it has held that this court's decision in the *Woods* case is in turn in conflict with the decision of the Supreme Court of Illinois in *People* v. *Rave,* 392 Ill. 435, on a question of Illinois law concerning the availability to respondent of statutory *coram nobis.* It reached this con-

clusion although the *Rave* case was cited to and considered by this court in deciding the *Woods* case.

It is petitioner's and the Illinois Attorney General's view that the decision of the Circuit Court of Appeals should be reversed. But it is of the utmost importance that district judges in Illinois be not confronted with a decision in their own circuit that declares in express terms that the *Woods* case was wrongly decided by this court and should not be followed by Illinois district judges.

The case affects the rights of several hundreds if not more than a thousand prisoners in Illinois. The great importance of the case is more fully explained hereafter.

Note on Transcript References.

Since this case reached the Circuit Court of Appeals upon a pauper's record, the same was not printed in that court. Accordingly, all references to the transcript must necessarily be made to the single, unprinted copy of the record filed with this petition. Petitioner will, of course, have the record printed here upon being furnished with an estimate of the cost.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The District Court for the Northern District of Illinois Eastern Division, Judge John P. Barnes presiding, refused to issue a writ of *habeas corpus* (R. 98) but certified probable cause for review of such refusal upon a petition for that writ filed by John H. Rooney (respondent here) (R. 100). Respondent is serving a sentence of life imprisonment in the Illinois penitentiary for murder (R. 26). He prepared his petition *pro se* but was represented by distinguished counsel in the Circuit Court of Appeals. The averments of the petition (R. 12-53), which were not contested and which we therefore must and do assume to be true, may fairly be cast in narrative form as follows:

Having been suspected and accused of the murder of one Stanley Gross in connection with a violent labor altercation in Chicago, respondent was apprehended in Wisconsin and, without warrant or process of extradition, was returned against his will to Chicago (R. 13).

On the trial which followed his indictment, he moved to suppress from the evidence a pair of field glasses which were unlawfully seized on an unlawful search. The motion was granted and the field glasses were suppressed. He complains, however, that the court permitted allusion in the testimony to his possession of a pair of field glasses on the night of the killing and before any illegal seizure thereof.

It appears that the conviction rested at least in part upon the testimony of a man named Alex Davison or Alex Davidson (both spellings appear in the record), whose testimony at the trial implicated respondent (R. 19). It further appears that Davidson was an accom-

plice in the killing and that he has received consideration in the form of leniency and employment on public payrolls for his testimony against respondent. It also appears that Davidson has made an affidavit, reproduced in full as Exhibit C to respondent's petition for writ of *habeas corpus* filed in the district court, and reprinted in full in the margin, recanting his testimony and averring that he gave evidence against respondent to escape prosecution for complicity in the murder, to secure a job on the public payrolls, for cash and other ulterior considerations. The affidavit (R. 44-46) is printed in full in the margin.[1]

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[1] The text of Davidson's affidavit is as follows:

State of Illinois }
County of Cook } ss.

(Original on file in the personal file of Henry Berry, 7903-E, Board of Pardons asd Paroles, Springfield, Illinois.)

Alex Davidson, being first duly sworn upon his oath, deposes and says: that he is a resident of the City of Chicago, County of Cook, and the State of Illinois, and that he testified for the State of Illinois in the case of the *People of the State of Illinois* v. *John H. Rooney, Henry Berry, alias Hogan Berry, et al.*, in the Criminal Court of Cook County, before his Honor Judge Harry B. Miller, the presiding Judge of said trial, during the summer of 1933.

This affiant further states that he was arrested by the police officers of the State's Attorney's Office of Cook County for approximately one (1) week after the murder of Stanley Gross, who was killed on the 23rd day of May, 1933, while seated in an automobile in front of Goldblatt Brothers Store on Chicago Avenue, in the City of Chicago, County of Cook, and State of Illinois.

I was brought to the State's Attorney's Office and asked whether Hogan Berry was there. I denied Hogan was there and I was released.

About a week after the murder this affiant was arrested by police officers and taken to the State's Attorney's Office, located at 26th and California Avenue, in the City of Chicago, County of Cook and State of Illinois, and there questioned by Mal Coghlin and Wilbur Crowley, both Assistant State's Attorney's of the City of Chicago, County of Cook, and State of Illinois, for a period of approximately thirty minutes. They asked me what my occupation was and I told them that I was employed as bartender, porter and caretaker of the Circular Distributors Hall, located at approximately 9 N. Racine Avenue, in the City of Chicago, County of Cook and State of Illinois, and that I started employment there on the 22nd of May, A. D. 1933. I was asked if I was in the said Union Hall of the Circular Distributors Hall on the morning of May 23rd, A. D. 1933. They asked me if I remained in the Union Hall from the evening of the 22nd of May, A. D. 1933, to and including the night the State's Attorney's Office. About two or three days later, I was arrested by Officers of the State's Attorney's Office, County of Cook and the morning of May 23rd, 1933 A. D., and I replied there was only John Rooney, one of the defendants in the case in which I testified for and in behalf of the People of the State of Illinois. I was released and left the State's Attorney's Office. About two or three days later, I was

It will be noted that although it does indeed appear from this affidavit that Davidson changed his story to the police, first refusing to implicate and later implicating respondent, it does *not* appear that the State's Attorney's office knew which of Davidson's two stories was true or that Davidson's testimony at the trial was suborned by the State's Attorney's office or any other public officials. For aught that appears explicitly or by fair inference, the question of which of Davidson's stories was true was fairly left to the jury on the trial.

This affidavit was not made until long after respondent's conviction had been affirmed.

Respondent, represented by William Scott Stewart as his counsel, obtained a review of his conviction by the Supreme Court of Illinois upon writ of error (R. 15). That

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arrested by Officers of the State's Attorney's Office, County of Cook and the State of Illinois, and taken to the State's Attorney's Office, located in said County and there was again questioned by Wilbur Crowley and Mal Coghlin. I was asked whether or not Hogan Berry was in said headquarters on the evening of May 22nd, 1933, and the morning of May 23rd, 1933, by the said Wilbur Crowley and Mal Coghlin. I was told that if I testified for the State that I would not be prosecuted in this case and that I would be taken care of by the State's Attorney's of Cook County, and that I would be given employment. I then stated that Henry Berry, alias Hogan Berry, was in the Union Hall on the evening of the 22nd of May 1933, and the morning of May 23rd, 1933, with John Rooney, Rose Rizzo and myself.

Affiant further states that he lied in respect to his testimony with reference to Henry Berry, alias Hogan Berry, and that the truth of the matter is that Henry Berry, alias Hogan Berry, remained in the Union Headquarters of the Circular Distributors Union from five (5) P. M. of the evening of May 22nd, 1933, and did not leave the premises of the said Union Headquarters until seven o'clock on the morning of May 23rd, 1933, at which time he left intoxicated and was helped into a cab by persons I do not recall at this time.

On the evening of May 22nd, 1933, I worked as a bartender in the said Union Headquarters from the hour of 10:00 P. M. until after 7:00 A. M. on the morning of May 23rd, 1933.

This affiant further states that the said Henry Berry, alias Hogan Berry, was in a helpless state of intoxication from the hour of 11:00 P. M. May 22nd, 1933, to and until the time he left the said Headquarters at the hour of about 7:00 A. M. on May 23rd, 1933, at which time he was helped from the Headquarters, down the stairs and in a cab that was waiting.

This affiant further states that his testimony in the said case in which he testified that Henry Berry, alias Hogan Berry, said, "You ought to

court's opinion appears at 355 Ill. 613. Respondent contended in that court that much incompetent evidence was received against him, that his guilt was not proved beyond all reasonable doubt, and that verbal allusion to respondent's possession of field glasses on the night of the murder should have been stricken because the glasses themselves had been illegally seized. These contentions were overruled by the Supreme Court of Illinois. No attempt was made to have respondent's conviction and the Illinois Supreme Court's affirmance thereof reviewed by writ of *certiorari* from the Supreme Court of the United States.

In seeking discharge by *habeas corpus* in the federal courts, respondent asserts many claims of rights but they fall into two categories: *first,* matters which occurred before or at his trial, which either were or could have been raised

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see the way we let him have it"; meaning John Rooney, was not and is not true.

This affiant further states that the time of his second arrest and during the time and before and also the time during the trial of the said defendants in this matter, he was maintained by the State's Attorney of Cook County, in the Palmer House, a hotel located in the City of Chicago, County of Cook and State of Illinois, and also in the Clayton Hotel, another hotel in the City of Chicago, County of Cook, and State of Illinois, and that all food, cigars, cigarettes and entertainment, such as being taken by Officers of the State's Attorney's Office, of the County of Cook, and State of Illinois, to baseball games, theaters and other places of amusement, and expenses were paid by the State's Attorney's Office of the County of Cook, and State of Illinois. That the State's Attorney's Office of the County of Cook and State of Illinois did obtain employment for this affiant in the Street Department of the City of Chicago and State of Illinois.

This affiant further states that since the time of this trial, the matter of his testimony in the Criminal Court of Cook County has been preying upon his mind, leaving him in a restless and worried condition, thinking and knowing that Henry Berry, alias Hogan Berry, is an innocent man and that a miscarriage of justice has been done.

This affiant further states that he has looked up relations of the said Henry Berry, alias Hogan Berry, and explained the contents of this affidavit to them.

The purpose of this affidavit is for the presentation to the Board of Pardons and Paroles, of the State of Illinois, and in behalf of the said Henry Berry, alias Hogan Berry, in order that he may be pardoned, for he is innocent of the crime for which he is now serving time in the penitentiary at Joliet, Illinois.

/s/ Alex Davidson
(THUMBPRINT)

Subscribed and sworn to before a notary public on December 17, 1936.

or considered on that trial and on writ of error, and which could have been made the basis for *certiorari* from the United States Supreme Court; and *second*, alleged rights predicated upon Davidson's affidavit of recantation, which was not a part of respondent's record on the trial resulting in his conviction.

Mention should also be made of the fact asserted by petitioner (R. 20-21) that until Judge Barnes' decisions in the Northern District in *U. S. ex rel. Bongiorno* v. *Ragen*, 54 Fed. Sup. 973, affirmed by the Circuit Court of Appeals in 146 Fed. 2d 349, and *U. S. ex rel. Foley* v. *Ragen*, 52 Fed. Supp. 265, reversed by the Circuit Court of Appeals in 143 Fed. 2d 774, prisoners were not allowed to send petitions for *habeas corpus* from inside the walls of the penitentiary. Respondent says that this practice disabled him from seeking this court's writ of *certiorari* to review his original conviction. But respondent concedes that since the *Bongiorno* decision such petitions and all other applications for review *in forma pauperis* may freely be sent.

Respondent's Failure to Exhaust State Remedies.

Illinois' statute authorizing proceedings in the nature of the common law writ of error *coram nobis* in lieu of that writ itself, which is quoted in the margin,[2] has been before this court in *White* v. *Ragen*, 324 U. S. 760, *Lutz* v. *Ragen*, *id.*, a companion case to *White* v. *Ragen*, and *Woods* v. *Nierstheimer*, 66 S. Ct. 996. **Respondent has made no**

[2] "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years.' (Ill. Rev. Stats. 1945, Ch. 110, par. 196.)

effort to file a petition for relief under the Coram Nobis act above cited.

He did file a petition for writ of *habeas corpus* in the Circuit Court of Will County, Illinois, in which county he was and still is incarcerated; and when that writ was denied (R. 21, 48-50) sought this court's writ of *certiorari*, but was refused the same for the reason that the application was not made within the time provided by law. He then petitioned the criminal court of Cook county, the jurisdiction in which he was tried and convicted, for its writ of *habeas corpus*. The writ was denied (R. 107). This court refused *certiorari* on December 10, 1945 (R. 108).

The Holding of the Circuit Court of Appeals.

Since the opinion of the Circuit Court of Appeals (R. 154-165) did not advert to any of the matters complained of by respondent as improperly occurring upon his trial, we assume that the Circuit Court of Appeals acquiesced in petitioner's contention that no federal question was raised by respondent's insistence that verbal allusion to field glasses as being in his possession at the time of the murder denied him due process merely because these field glasses were later illegally seized.

But the Circuit Court of Appeals did hold, contrary to petitioner's contention, that Davidson's affidavit of recantation not only effectively charged that respondent was convicted on perjured testimony, but was equally effective in accusing state prosecuting officials with *knowledge* that the testimony was false.

The Circuit Court of Appeals, rejecting petitioner's contention that respondent had not demonstrated an exhaustion of state remedies under *White* v. *Ragen*, *Lutz* v. *Ragen*, and *Woods* v. *Nierstheimer*, cited *ante*, explicitly recognized that its decision in the instant case was inconsistent with

this court's holding in the *Woods* case, but made it clear that it thought that this court ignored the decision of the Illinois Supreme Court in *People* v. *Rave*, 392 Ill. 435. The Circuit Court of Appeals said:

> "The opinion in the *Rave* case antedates the opinion in the *Van Woods* case by some four months. It is therefore, difficult to comprehend the statement of the court in the Van Woods case upon any basis other than that the law of Illinois, as decided by the Supreme Court, in the Rave case, was not called to its attention. * * *" (Emphasis supplied.) (R. 164.)

But the fact is that the Rave case was cited and argued to this court at page 12 of the brief for petitioner in the Woods case. This fact was called to the attention of the Circuit Court of Appeals on petition for rehearing (*Petition for Rehearing*, p. 2), but nevertheless the Circuit Court of Appeals allowed its opinion to stand and to include its statement that

> "the law of Illinois, as decided by the Supreme Court in the Rave case, was not called to its [this court's] attention. * * *"

The Circuit Court of Appeals failed to give recognition to the fact that although the *Rave* case did hold that *coram nobis* was not available in that case because the conviction had occurred more than five years prior to the application for that remedy, the *Rave* case, unlike the Woods case and unlike the instant case, contained no charge that the prisoner's attempts to communicate with state courts were intercepted or frustrated.

The Circuit Court of Appeals also read the decision of the Appellate Court of Illinois in *People* v. *Austin*, 329 Ill. App. 276, as holding that Illinois courts will not entertain applications for *coram nobis* after the lapse of a period of five years, even though a prisoner's efforts to communicate with the courts was intercepted. But the Circuit Court of Appeals refused to give effect to the Illinois rule that all

state and federal constitutional questions are waived by taking the case to the Appellate, instead of the Supreme Court (*People* v. *Terrill*, 362 Ill. 61; *People* v. *Lawson*, 351 Ill. 507; *People* v. *Garwood*, 317 Ill. 578 and *People* v. *Andalman*, 346 Ill. 149), and also refused to follow this court's holding in *Graham* v. *White-Phillips Co.*, 296 U. S. 27, that decisions of the Illinois Appellate Court do not invoke *stare decisis* and are not binding on federal courts in ascertaining the Illinois law.

Reaching the substantive question whether the statements in Davidson's affidavit, treated as a part of respondent's pleading, charge lack of federal due process, the district court held, contrary to petitioner's contention, that Davidson's averments that he first denied that respondent was guilty of the crime and then changed his story so as to affirm respondent's guilt in consideration of promises of leniency and a chance for a job on the public payrolls amounted to a charge not only that respondent was convicted on perjured testimony but amounted to a further charge that Illinois prosecuting officials *knew* that such testimony was perjured.

Respondent raises the question whether public officials can be deemed to be charged with knowledge that the prosecution's testimony is perjured because a witness, having first denied his own or another's complicity in a crime, implicates a co-defendant after a promise of leniency.

It was petitioner's contention, rejected by the Circuit Court of Appeals, that due process requires honesty and fairness on the part of public officials, not of witnesses, and that when the prosecuting officials have reason to believe that a defendant is guilty, obtain corroborating evidence of that fact from an accomplice and offer the testimony of such accomplice as a witness with full disclosure of the fact that he is an accomplice and has been promised immunity or other leniency, due process is afforded in the absence

of a positive showing (or positive and undenied averment in a pleading) that the state officials knew that the testimony was false.

The question is an important one; for public officials throughout the country "bargain" with accomplices to turn state's evidence and if the charge of such a bargain charges a denial of due process, this court should so declare. If such bargaining does not imply official knowledge that the accomplice's testimony is false, the Circuit Court of Appeals should be reversed.

Statement of the Basis for This Court's Jurisdiction to Review.

This court's jurisdiction is invoked under Section 240 of the United States Judicial Code (Title 28, U. S. C. A. sec. 347).

The Questions Presented.

The questions presented are:

1. Did the Circuit Court of Appeals err in substituting its own reading of *People* v. *Rave*, 392 Ill. 435 for this court's reading of that case in *Woods* v. *Nierstheimer*, ... U. S. ..., 66 S. Ct. 996, and in thereupon reversing this district court?

2. Did the Circuit Court of Appeals err in holding that respondent had exhausted adequate state remedies (or in holding that he had no adequate state remedies) and in therefore reversing the district court's refusal to take jurisdiction of the case?

3. Did the Circuit Court of Appeals err in holding that averments and affidavits charging that respondent was convicted upon perjured testimony, there being no averment that any prosecuting official knew that the testimony was perjured, imported a charge of denial of due process of law?

Reasons Relied Upon for the Allowance of the Writ.

As appears from the foregoing Statement of the Case and as is made clear in the Supporting Brief, *post*, the Circuit Court's decision in this case confronts Illinois district judges with a repudiation of this court's holding in *Woods* v. *Nierstheimer*, cited above, on a question that arises almost daily in district federal courts and that, as this court is aware, involves the claims of hundreds of Illinois prisoners.

Illinois cannot overemphasize the very great importance of this question. The Attorney General assures this court that the problems and dilemmas precipitated by the Circuit Court's decision are crucial.

Very important, too, is the question whether the Circuit Court's intimation that charges that bargaining with an alleged accomplice for his testimony constitutes *per se* a denial of due process of law. This practice is inveterate and widespread. Its propriety has been recognized by this court in *Lisenba* v. *California*, 314 U. S. 219. If the Circuit Court's opinion is to become a precedent, not only in Illinois but in all other states, it should have the sanction of this court's approval expressed in an opinion. But we contend that the Circuit Court's view on this question is wrongly conceived and that it should be corrected.

WHEREFORE, petitioner prays this court to issue its writ of *certiorari* to review the opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

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No.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

Statement That the Opinions Delivered in the Courts Below Have Not Been Reported.

The opinions of the district court and the Circuit Court of Appeals have not been officially reported at the time of the writing of this brief. Both opinions appear in full in the record.

The opinion of the district court appears at Record page 98. The opinion of the Circuit Court of Appeals appears at Record pages 154-165.

Reference to the Petition for Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked and for a Concise Statement of the Case.

The facts in this case are of such simplicity that they were stated in full in the petition for the writ of *certiorari, ante.* Reference to that petition is made for "A Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked," as well as "A Concise Statement of the Case Containing All That Is Material to the Consideration of the Questions Presented."

Specification of Errors Intended To Be Argued.

1. The Circuit Court of Appeals erred in holding that the respondent had no adequate remedy in the state courts for the assertion and vindication of his claims of denials of due process.

2. The Circuit Court of Appeals erred in holding that the respondent's averments and Davidson's affidavit effectively charged state prosecuting officials with knowledge that respondent was being prosecuted on perjured testimony.

3. The Circuit Court of Appeals erred in reversing the judgment of the district court.

ARGUMENT.

AN INDEX AND SUMMARY OF THE ARGUMENT APPEARS IMMEDIATELY PRECEDING THE PETITION, ANTE.

I.

The Seventh Circuit Court's holding that this Court overlooked or misapprehended the Illinois law should elicit certiorari.

The Circuit Court of Appeals has said in the instant case:

> "The opinion in the *Rave* case antedates the opinion in the *Van Woods* case by some four months. It is, therefore, difficult to comprehend the statement of the court in the *Van Woods* case upon any basis other than that the law of Illinois, as decided by the Supreme Court in the *Rave* case, was not called to its attention. * * *"

The Circuit Court's statement is incorrect. The fact is, as counsel for the petitioner conceded in his brief and on oral argument in the Circuit Court of Appeals, that the *Rave* case was cited to this court in the *Woods* case by Mr. Edward H. Levi, counsel appointed by this court to represent Woods, at page 12 of his brief in the *Woods* case.

Counsel in the instant case said in his brief in the Circuit Court of Appeals (the following language is quoted in the petitioner's petition for rehearing and hence is a part of the record in this case):

> "The issue appears to us to be conclusively determined by the decision in *People* v. *Rave, and we would rest the point were it not for the fact that the case was relied on by petitioner Woods in the United States Supreme Court.* * * *" (Emphasis supplied.)

Nevertheless, the Circuit Court of Appeals adhered to its declaration that this court had overlooked and misapprehended the teachings of the Illinois Supreme Court in the *Rave* case.

We agree that *if* a decision of this court is in fact inconsistent with authoritative decisions of state courts, a Circuit Court of Appeals must follow the state court's decisions and not those of this court when the question is one of state law.

But this court's reading of the *Rave* case was more discerning than is that of the Circuit Court of Appeals. In the *Rave* case, although the prisoner had been confined in the penitentiary for more than five years, he made *no showing* that his attempts to communicate with the state or federal courts had been interfered with. He predicated his claim of duress on the mere contention, nakedly standing alone, that penal durance is in itself such duress under a proper construction of Illinois statutory law as to toll the Illinois statute of limitations.

It may be true, as a matter of fact *dehors* the record, that Rave's attempts to communicate with state and federal courts were intercepted. But that fact was neither alleged nor made the basis of any claim on the part of Rave.

Therefore, the *Rave* case did *not* decide the question presented by either the *Woods* case or the instant case, namely, the question: May a prisoner who has been confined in the penitentiary for more than five years *but whose right to communicate with either state or federal courts has been intercepted by the Warden, until a time within less than five years of the commencement of his coram nobis proceeding,* seek vindication of his charges of want of due process by *coram nobis* proceeding in the state court.

The Circuit Court of Appeals cites *People* v. *Austin*, 329 Ill. App. 276, which does imply that the statute of limitations as to *coram nobis* proceedings is not tolled by interception of a prisoner's attempts to communicate with courts. But the *Austin* case is a decision of the appellate court; and under Illinois appellate jurisprudence, one who appeals to the appellate court waives all questions arising under the state and federal constitutions. (*People* v. *Terrill*, 362 Ill. 61; *People* v. *Lawson*, 351 Ill. 507; *People* v. *Garwood*, 317 Ill. 578; and *People* v. *Andalman*, 346 Ill. 149.)

Furthermore, decisions of the appellate court are no more authoritative under Illinois' doctrines of *stare decisis* than are decisions of the circuit courts, county courts or justices of the peace.

This court's decision in *Graham* v. *White-Phillips Co.*, 296 U. S. 27, holds that this is so even where the appellate court decision construes a state statute. In the *White-Phillips case*, cited above, the Supreme Court of the United States adopted its own construction of an Illinois statute although it recognized that its decision flatly contradicted the construction placed upon the same statute by an Illinois appellate court.

The Circuit Court's decision in the instant case precipitates the following very grave crises in the federal jurisprudence of *habeas corpus* in Illinois:

Hundreds of Illinois prisoners seek access to federal district courts by application for *habeas corpus*. These prisoners charge matter *dehors* the record, such as that they were coerced into pleading guilty, that they were betrayed by counsel appointed by the court, that they were convicted upon perjured evidence upon the connivance of public officials, and that they were prevented from

summoning witnesses who would have testified the material facts in their defense.

According to this court's holding in the *Woods* case, it must be presumed that Illinois affords a remedy by *coram nobis* in such cases even after five years provided, at least, that state officials have frustrated the petitioner's attempts to communicate with state courts during that period of time. (See *People* v. *Green*, 355 Ill. 468, cited by this court in the *Woods* case.)

This court said in the *Woods* case (not yet officially reported), 66 S. Ct. 996, at 999:

> "* * * Nor do the denials of petitioner's applications for *habeas corpus* present a federal question merely because the five-year statute of limitations on the statutory substitute for the writ of error *coram nobis* has expired. Petitioner claims that this leaves him without any remedy in the state courts. But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of *habeas corpus*, would, taken together, amount to a complete deprivation of a state remedy where Constitutional rights have been denied. We would reach that question only after a denial of the statutory substitute for the writ of error *coram nobis* based on the statute of limitations had been affirmed by the Supreme Court of the state. * * *"

This court's unanimous declaration above quoted was made after the *Rave* case had been cited to and considered by it in the *Woods* case. Therefore, if this court's decision in the *Woods* case and the Circuit Court's decision in the instant case are both to stand, district judges in Illinois will be confronted by declarations of this court that are

inconsistent with an opinion in their own circuit court of appeals upon a question which arises almost daily in Illinois federal courts and which involves the rights of hundreds of prisoners.

We think that this court should adhere to its ruling in the *Woods* case and reverse the Circuit Court's decision in the instant case. But if this court is to acquiesce in the Circuit Court's repudiation of its decision in the *Woods* case, it should, for the guidance of district judges, Illinois lawyers and the prisoners themselves, grant *certiorari* and itself retract its holding in the *Woods* case in unmistakable terms.*

We therefore respectfully urge this court to grant its writ of *certiorari* in this very important case.

II.

Certiorari should be granted because of the Circuit Court's virtual holding that mere "bargaining with" a co-defendant for his testimony denied due process.

Davidson deposes in his affidavit of recantation that the testimony that he gave against respondent at respondent's trial was perjured and that respondent was in fact innocent. But it does *not* charge that the state prosecuting officials had *knowledge* that his testimony was false. It does appear that his statements first exonerated, then implicated, respondent; and it appears that he was given very substantial concessions for his testimony against respondent.

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* An incidental but, we think, important consideration is that Illinois judges read decisions of this court and the Circuit Court of Appeals with respect, if not as authoritative, on questions of Illinois law. If Illinois judges follow the *Woods* case, thereby remitting the prisoner to the federal courts, and district judges follow the instant case, re-remitting such prisoners back to the state courts, very serious confusion in cases involving the liberty and alleged rights of hundreds of prisoners is certain to ensue.

But if the Circuit Court's opinion is to stand, it introduces into constitutional jurisprudence a principle of revolutionary importance, namely, the principle that mere bargaining with a co-defendant for his testimony, without positive knowledge on the part of prosecuting officials that his testimony is false, denies due process to a prisoner even though the fact of such bargaining is fully disclosed to the jury on the trial.

The Circuit Court's decision is, we submit, at variance with this court's holding in *Lisenba* v. *California*, 314 U. S. 219. In that case this court, considering a case in which a defendant was convicted of murder and sentenced to death upon the testimony of an accomplice, where such testimony was "bargained for" by promises of leniency, said, at page 227:

> "• • • The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice. There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate. • • •"

A situation classically typical of prosecution methods throughout the United States occurs when one of several persons suspected of a crime first denies his guilt and that of his alleged accomplices, is then offered leniency or other concession, and admittedly in contemplation of and presumably in consideration for such concession, testifies against co-defendants at the trial. In such cases, the co-defendant who "turned state's evidence" is subjected to a cross-examination upon which it plainly appears that his testimony is the result of an offer of possible, probable or even promised lenity in the matter of his sentence. Not infrequently, as in the instant case, the charges are dismissed as to the co-defendant.

In many of such cases admittedly the prosecuting attorneys do not *know* whether the confederate is telling the truth or committing perjury. That question is left to a jury upon full disclosure of the interest of the accomplice in helping to secure a conviction of co-defendants.

If this practice is to be denounced either because (a) it is *per se* illegal or because (b) knowledge of the probable falsity of the accomplice's testimony is to be imputed to the prosecuting attorneys on the theory that induced testimony is presumably false, surely this court should say so in no uncertain terms; for such concessions are usual inducements to accomplices. But if this practice does not deny constitutional due process (cf. *Lisenba* v. *California*, cited above), then the Circuit Court's decision in the instant case should not become a precedent for discharging thousands of other state prisoners throughout the nation convicted upon the testimony of an accomplice where such testimony is procured by concessions.

Conclusion.

For the reasons suggested in the petition and argued in this brief, it is respectfully submitted that this case is very clearly of such great importance as to elicit this court's writ of *certiorari*.

It is further submitted that upon review by this court the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed.

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